UNITED STATES OF AMERICA
Before the
COMMODITY FUTURES TRADING COMMISSION

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ERIC C. CLARK, Complainant,	*	
v.	*	CFTC Docket No. 03-R80
FARR FINANCIAL, INCORPORATED, OMID MATHEW FARR, and MARK EDWARD GAY, Respondents.	*	

INITIAL DECISION

Introduction

Eric Clark, a resident of California, alleges that respondents mishandled a good-til-cancelled stop order to sell seven June Japanese Yen futures contracts. Before Clark left on a week-long trip to China, he called his broker Mark Gay for advice. Clark told Gay that he assumed he would be out of reliable phone or internet contact with Farr Financial and was concerned about his exposure in several open positions, including seven long June Yen contracts. According to Clark, after rejecting Mark Gay's advice to sell the seven June Yens at a profit, he adjusted the price on a stop order to sell the seven June Yens. Just before Clark left for the airport, he checked the June Yen market and noticed that the market had hit and then traded below his new stop price. Clark assumed that the seven Yen had been sold. When Clark returned a week later, he checked his account on-line and discovered that he was still long the seven Yens. Clark claims that he asked Gay why he was still in the market and that Gay promised to investigate. However, according to Clark, Gay never called back and two days later sold the seven

Yens without authorization. Clark seeks to recover $16,450, the difference between the fill price and the alleged initial stop price.

In reply, respondents deny any violations and assert that Clark's version of events is based on a mistaken recollection. According to respondents, Clark did not adjust the price on the stop order to sell the Yens, but is confusing that order with another order he placed the same day, a stop order to buy Pork Belly futures. Respondents deny that the sale, on the last trading date for the June Yen, was unauthorized. Respondents assert that Clark had no intention to take delivery and changed the stop order to a market order. Respondents also assert that the complaint is barred by the statute of limitations.[1] As explained below, I have concluded that Clark has failed to establish by a preponderance of the evidence any violations in connection with the sale of the seven June Yen futures contracts.

Statute of Limitations

Clark was called to active duty by the United States Navy three months after the disputed order. As a result, Clark filed his complaint two years and two months after the disputed trade.[2] Respondents assert that since Clark waited over two years after the disputed sale his complaint should be barred by the statute of limitations. In response, Clark invoked equitable tolling and asserted that the statute of limitations should be tolled for the twenty-month period that he had been called up to active military duty at the U.S. Central Command in support of military activities in Afghanistan and Iraq. Respondents have the burden to establish the affirmative defense that the claim is time-barred.

[1] Respondents did not raise any other affirmative defenses.
[2] Clark was activated again a couple of months after he filed his reparations complaint, which resulted in a delay to this proceeding.

Neither Clark nor respondents mentioned the applicability of the Soldiers' and Sailors' Civil Relief Act of 1940 ("SSCRA"), 50 App. USCA §501 *et seq.*, or the Servicemembers Civil Relief Act ("SCRA"), Pub. L. 108-189, §1, 117 Stat. 2835, which updated and amended the SSCRA and which was signed by the President on December 13, 2003. The SSCRA and the SCRA both provide that the period of a service member's military service may not be included in computing any period limited by law for the bringing of "any action in any court or government agency." Thus, the statute of limitations will be tolled for approximately twenty months if it is established that the SSCRA applies to CFTC reparations proceedings and that Clark was on active duty for approximately twenty months during the relevant period. [3]

By Order dated December 2, 2004, I denied respondents' motion for summary disposition on the statute of limitations issue. In that Order, I explained that respondents had not addressed whether or not the SSCRA applies to CFTC reparations proceedings and had not addressed whether or not Clark's twenty-month assignment to the U.S. Central Command was "active duty." Therefore, I concluded that respondents had failed to establish that there were no genuine issues of material fact to be determined and thus had failed to establish that they were entitled to a decision as a matter of law. Subsequently, Clark produced evidence confirming that he had been on active duty during the relevant time. In contrast, respondents ceased pressing the statute of limitations defense. Accordingly, I have concluded that the SSCRA applies to CFTC reparations proceedings

[3] For this ruling, I have assumed that the pre-SCRA version of the SSCRA applies to this case since the SCRA had not been enacted until after the relevant time. In this connection, the pertinent provisions of the SSCRA and SCRA appear to be substantially similar. *Compare:* §510 of the SSCRA and §2 of the SCRA (purposes of the Act), §511 of the SSCRA and §§101(1), (2) and (3) of the SCRA (definitions of "service member," "military service," "active duty," and "period of military service"), §512(1) of the SSCRA and §§102 (a)(1) and (b) of the SCRA (jurisdiction and applicability of the Act), §516 of the SSCRA and §106(a) of the SCRA (extension of rights and protections to reservists), and §525 of the SSCRA and §206(a) of the SCRA (tolling of statute of limitations during military service).

and that the statue of limitations must be tolled for the approximately twenty months that Clark was on active duty. Thus, respondents have failed to establish that Clark's complaint is time barred.

Credibility of the Witnesses

Due to the passage of time, Clark's and Gay's recollection of important conversations has substantially dimmed. Neither Clark nor Gay could refresh their recollection of the conversations since neither had maintained a log of those conversations. Gay conceded at the hearing that he could recall little about the conversations. Clark was particularly confused about the dates of conversations after his return from China. Thus, the most reliable record of those conversations was set out in two letters exchanged between Clark and Omid Farr about six weeks after the disputed trade and just before Clark resumed active duty. Respondents also produced reliable documentary evidence regarding the circumstances around the disputed order: CME "Daily Price Range" reports for the June Japanese Yen contract on relevant dates; Qwest phone records showing calls to Clark on relevant dates; Farr Financial order tickets for orders in the Clark account; and Farr Financial computer-generated listings of orders in Clark's account.

Although Clark testified in a truthful manner, his recollection of important details was contradicted and rendered implausible in several places by the reliable documentary evidence. For example, Clark conceded at the hearing that he had been mistaken from the beginning about the initial stop price. As a result, it appears that Clark's faulty recollection was based on mistaken impressions formed at the time of the disputed trade.

In contrast, Gay's version of events was internally consistent and consistent with reliable business records. Thus, Gay's version appeared more plausible and reliable when viewed in light of the surrounding circumstances. The findings below reflect that credibility determination.

Factual Findings

1. Eric Clark, a resident of California, is a commander in the Navy Reserve. When not on active duty, he has been employed as an aerospace system analyst. Clark has a bachelor's degree in Business Administration. On his Farr Financial account application, Clark indicated that he had traded futures for two years and invested in securities for ten years. Clark opened his Farr Financial account almost two years before the disputed trade. During these two years, Clark actively traded and realized substantial six-figure losses and profits. According to Clark, he typically placed orders over the phone, and Farr Financial left voicemail messages confirming the fills. Clark did not keep a written log of his pending orders. Mark Gay acted as Clark's account executive during the relevant time. [*See* pages 4- 20, and 111-112, of hearing transcript.]

2. The disputed trade involved the sale of seven June Japanese Yen futures contracts. Clark had initially accumulated seven long March Yen contracts at an average price of .8306, and then rolled them over into June contracts.

At the relevant time, Clark was on active duty in Japan. Sixteen days before Clark left on a one-week trip to the Peoples' Republic of China, he placed an order to sell the seven June Yens at an .8000 stop, good-til-cancelled. [*See* "trade ticket details" (Respondents' Trial Exhibit 3), listings of orders (Respondents' Trial Exhibit 2), and phone records (Respondents' Trial Exhibit 1).] In his protest letter to Omid Farr and in his reparations complaint, Clark had asserted that he had set the initial stop price at .8200. At the hearing, Clark conceded that he had been mistaken on this point. In addition, CME records show that, on the date that Clark placed the order, the June Yen traded between .8135 and .8184. Thus, in the normal course of business, a buy stop order at .8200 would have been rejected as a bad stop. [*See* pages 21-26, and 43-51, of hearing transcript; CME "Daily Price Range" reports (Respondents' Trial Exhibit 7); and ¶ 5 of Gay's affidavit.]

3. The day that Clark left for his trip, he had large open positions in the U.S. Dollar Index, Dow Jones Index, Pork Belly and Live Cattle futures, in addition to the seven Yen futures.[4] That day, Clark spoke to Gay to discuss these positions.[5] During this conversation, according to Farr Financial records, Clark placed an order to buy seven July Pork Bellies at an .8200 stop. This Pork Belly order appears to be the source of Clark's mistaken assertion that he had set the initial stop price for the June Yens at .8200.[6] [*See* listings of orders (Respondents' Trial Exhibit 2), and phone records (Respondents' Trial Exhibit 1).]

According to Clark, during this same conversation Gay initially advised Clark to sell the Yen to capture a $9,000 profit. However, for reasons not stated in the record, Clark decided not to sell. In his complaint, Clark states:

> Instead of exiting, we discussed moving my existihg stop of .8200 while the Yen was currently trading over .8400. 8400 was too tight. [T]hen [we set the stop at] .8320 [to] offset commissions on the seven contracts [*i.e.*, to break even].

[4] Farr Financial's phone records establish a 36-minute call on June 4th in the United States.
[5] Clark would eventually lose over $113,400 on these non-Yen trades.
[6] In the protest letter to Farr, Clark asserted: "My initial stop on these contracts was for .8200 and was increased to .8320." (Emphasis added.)

[Emphasis added.] Clark's recollection of this conversation is suspect not just because his existing stop had been .8000 rather than .8200, but also because CME reports show that the June Yen had not been trading over .8400 on this date. In any event, by the time he was packing for his trip, Clark mistakenly believed that he had a stop order at .8320. As he packed, Clark monitored the market and assumed that the seven Yens had been sold when he saw the market trade at and then through .8320. [*See* pages 25-29, and 44-47, of hearing transcript; and paragraph 6 of Gay's affidavit.]

Set out below are the daily high and low prices for the June Yen on the relevant dates:

Date	*High*	*Low*
June 4	83960	83640
June 5	83640	83150
June 6	83310	82960
June 7	83680	83320
June 8	83070	82700
June 11	82340	81970
June 12	82300	82020
June 13	82220	81900
June 14	82500	81910

[*See* Respondents' Trial Exhibit 7.] As can be seen, during the relevant time, the June Yen never traded over .8400.

Gay could not recall the details of this conversation with Clark. However, Gay testified that if Clark had in fact given him a stop order at .8320, he would have routinely entered the order and the order would have been triggered and filled on June 5th. [*See* pages 83-99 of hearing transcript.]

4. While Clark visited Beijing, Shanghai and Guiyang he did not check his voice mail for any confirmations from Farr Financial. [*See* pages 37-38, and 40-42, of hearing transcript.]

5. Clark returned to Japan on a Wednesday, two days before the last trading date for the June Yen. After checking his account on-line, he discovered that he was still long seven June Yen. [*See* pages 29-39, and 48-51, of hearing transcript.]

Also that Wednesday, Gay left a message with Clark warning him of the looming expiration on Friday, and asking him to call with instructions. Clark and Gay then had a brief discussion. Clark and Gay disagree with what was said during this conversation. However, neither man asserts that Clark ever expressed any intention to roll-over or to take delivery. Soon afterwards, Clark's .8000 stop order was cancel-replaced with an .8100 stop order. Gay credibly testified that during this conversation Clark did not complain that Farr should have already gotten him out of the market. According to Gay, if Clark had protested at this point, Gay would have immediately placed an order to get Clark out of the market, and then investigated the protest.[7] [*See* paragraph 6 of Gay's affidavit, and Respondents' Trial Exhibits 1, 2, 3 and 5.]

6. By the Friday expiration date, the market had not dropped to Clark's new stop price, and the .8100 stop order was cancel-replaced with a market order which was filled at .8132. Earlier, Gay had left a message with Clark that he had to get out of the market. Gay testified that he no longer could recall the conversation when Clark called him. However, in his letter to Clark a few weeks after the disputed trade, Omid Farr stated that he had interviewed Gay who told him that Clark had returned his message and given authorization to place a market order. In addition, Clark's assertion that he never gave an

[7] As noted above, respondents did not raise the defense of ratification.

authorization to sell the Yens at the market cannot be squared with the fact that he never expressed an intention to rollover or to take delivery. [*See* paragraph 7 of Gay's affidavit, and Respondents' Trial Exhibits 1, 2, 3 and 5.]

Conclusions

The preponderance of the evidence shows that Eric Clark initially instructed Farr Financial to sell the seven June Yen futures at .8000 stop, good-til-cancelled. Just before he left for China, Clark rejected Mark Gay's advice to sell the seven June Yens at a profit. Clark may have contemplated raising the stop on the Yens to .8320, but he did not give such instructions to Gay. On his return, two days before the last trading date for the June Yen, Clark cancel-replaced the .8000 stop order with an order to sell the seven June Yen futures at .8100 stop, good-til-cancelled. The market did not drop to the new stop price. Clark did not intend to take delivery or to roll-over into the next delivery month. Consistent with this strategy, on the last trading date for the June Yen, Clark authorized Gay to cancel-replace the stop order with a market sell order, which was filled. In these circumstances, Clark's allegation that respondents mishandled his order must fail.

ORDER

Complainant has failed to establish any violations causing damages. Accordingly, the complaint in this matter is DISMISSED.

Dated June 30, 2005.

Philip V. McGuire

Philip V. McGuire,
Judgment Officer